

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-713

UNITED STATES OF AMERICA,

Petitioner,

v.

SEA-LAND SERVICE, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	<i>Page</i>
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT	5
CONCLUSION	8

TABLE OF AUTHORITIES

<i>Cases:</i>	
Donovan v. Penn Shipping Co., 429 U.S. 648.....	6,8
Kaiser v. Standard Oil Co., 89 F.2d 58 (5th Cir. 1937).....	6
Kantor v. American & Foreign Power Co., 197 F.2d 307 (1st Cir. 1952).....	6
Smith v. Morris, 69 F.2d 3 (3d Cir. 1934).....	6
Swift & Co. v. United States, 276 U.S. 311, 72 L.Ed. 587 (1928).....	6
United States v. Hougham, 364 U.S. 310.....	7
United States v. Southern Ute Indians, 402 U.S. 159, 28 L.Ed. 28 (1971).....	6
Wilson v. Pentasote Co., 254 F.2d 700 (2d Cir. 1958).....	6
<i>Statutes:</i>	
46 U.S.C. §843	2
<i>Miscellaneous:</i>	
Fed. R. Civ. P. 58.....	4,7
Fed. R. Civ. P. 60(b)(1).....	5,7
Fed. R. Civ. P. 79.....	4

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OPINIONS BELOW

The Court of Appeals Order is unreported.¹ In addition to the District Court opinion noted by Petitioner, there is a second District Court opinion which is unreported.²

¹Petitioner's Brief, App. A, p. 1a-2a. There is also available the oral argument before the Court of Appeals which is preserved on a tape recording but not transcribed.

²C.T. App. 546-61. ("C.T. App." refers to the Appendix filed in the Court of Appeals).

QUESTION PRESENTED

Whether a consent judgment which has been fully paid and satisfied is appealable by the United States.

STATEMENT

This litigation arises from the Order of the Court of Appeals which dismissed the Petitioner's appeal for lack of jurisdiction because the Petitioner attempted to appeal a consent judgment which was paid and satisfied by Respondent. The consent judgment was in the amount of \$5,000 representing civil penalties for 5 violations of the Intercoastal Shipping Act, 1933, as amended.³

The facts of the case were stipulated and were comprehensively analyzed by the District Court in two opinions. In brief, each "violation" resulted from a request by a consolidator for a shipping container from Respondent and the refusal by Respondent to supply a container. Respondent's position was, and is, that there was no absolute duty to supply containers⁴ and therefore there was no breach in this instance when the containers were denied. The District Court found the following material facts:

"During the period between April 13 and August 14, 1973, SLS complied with the terms of the ILA agreement. Actual requests for containers which SLS refused to honor during this period, as reflected in the

³46 U.S.C. §843.

⁴The Petitioner actually conceded this in its Brief filed with the Court of Appeals on January 16, 1978, in which it stated that under Respondent's tariff it "could refuse containers because of the need for prior arrangements..." (p. 25-26).

record before me, appear to be limited to five requests by a single consolidator, Consolidated Express, Inc. The record also reflects that during the first six months of 1973, SLS was assessed, and it paid, \$102,000 in penalties for alleged violations of the ILA agreement. These penalties were not passed on to the individual consolidators involved. The parties have stipulated that in refusing to supply containers, SLS acted not in reliance on the tariff provisions which had been suspended by the FMC, but rather on its labor agreement and on its tariff which predated the amendments and the suspension order." 424 F. Supp. at 1011.

The District Court confirmed the principle that a "carrier is not required to perform the impossible," but only what is reasonable. 424 F. Supp. at 1011. However, the District Court held that the carrier's obligation was not excused in these circumstances.⁵ Accordingly, the District Court found that each of the five occasions was a violation and assessed Respondent a penalty of \$1,000 for each violation:

"Judgment is, therefore, rendered in favor of the United States in the amount of \$5,000.

The United States should submit an appropriate order." 424 F. Supp. at 1013.

The Petitioner drafted and submitted the order which was consented to by both parties and the District Court. A consent judgment was then entered on the docket of the

⁵Contrary to Petitioner's statement that the District Court "agreed with respondent...". (Petition p. 4) the District Court actually disagreed with Respondent. Respondent's position was that under the circumstances it was excused from any obligation to furnish containers for certain loads by virtue of Respondent's tariff.

District Court by the Clerk.⁶ Notice of entry was given to both parties.⁷ Respondent paid the consent judgment which was then satisfied of record and extinguished.⁸ In the argument on reconsideration the District Court pointed out:

"Parenthetically I note that counsel said we hereby consent to the entry of the foregoing judgment.

I wonder if that was really meant to be only to the form of it, because counsel has consented to a \$5,000 judgment. It looks like he acquiesced in a decision. I will leave that for another day."⁹

Nonetheless, the United States filed its "appeal" and the appealability of a consent judgment was briefed by the parties.¹⁰ This point was dealt with extensively at oral argument before the Court of Appeals.¹¹ The Petition notes that the Judges of the Court of Appeals asked whether the "judgment" might be a "consent judgment that the parties could later appeal." (p. 8) In addition, however, there were other points raised which the Petition omitted, particularly the Judges' interest in why the United States had not moved

⁶See Fed. R. Civ. Ps. 58 and 79. The actual docket sheet of the District Court Clerk is in the Appendix (C.T. App 566 filed with the Court of Appeals and states:

"3-22-77 Consent judgment for \$5,000 in favor of plaintiff United States of America and against defendant, Sea-Land Service, Inc., with costs to 3-17-77 (Meanor) Notice mailed."

⁷See Appendix E to Petition.

⁸Accordingly, Respondent did not appeal nor cross-appeal.

⁹C.T. App. 558 (May 9, 1977).

¹⁰The United States' Reply Brief (March 24, 1978) contained 4 pages of argument on this issue including discussion of certain cases relied on before this Court.

¹¹As noted above, the argument is preserved on tape but not transcribed as of this time.

for relief from the consent judgment under Fed. R. Civ. P. 60(b)(1) within one year as provided.

Respondent also respectfully takes issue with other factual and legal statements on the merits made by Petitioner in its STATEMENT, however, they do not go to the immediate issue as to the grant of a writ of certiorari.

ARGUMENT

Petitioner was accorded full review of its contention by the Court of Appeals and that Court's decision is correct. There is no important federal question requiring decision by this Court. Review by this Court is therefore not necessary.

1. The principal point asserted by the Petitioner is that the Court of Appeals' order was "unexplained" and that the Petitioner is now uncertain as to how to draft a judgment. (p. 8-9) Contrary to Petitioner's contention, it is abundantly clear why the Court of Appeals dismissed the appeal. First, the Court of Appeals stated in the Order that the dismissal was for "lack of jurisdiction." Second, that Order followed 1) briefing by both parties on the appealability of a consent judgment, and 2) oral argument on this point which included the question why the Petitioner had not sought relief under Fed. R. Civ. P. 60(b)(1) during the one year period in which relief was authorized. As to the briefs on this point, the argument which Petitioner makes to the Court is basically the same argument which it made to the Court of Appeals. Petitioner's Reply Brief, filed March 24, 1978, in the Court of Appeals presented 4 pages of argument entitled:

"This is not an appeal from a consent judgment which has been satisfied." (p. 4)

In that brief, Petitioner stated:

"The entry of the 'final judgment' embodying the district court's decision was then consented to by the parties (A. 593). However, such consent went only to the form of the judgment." (p. 4)

The Petitioner argued several authorities some of which are also presented in its Petition. As to the oral argument, there was extensive questioning of both sides on this issue and the matter was left with absolutely no uncertainty. Accordingly, the Court of Appeals decision was explained and there is really no doubt as to the basis of the decision.

2. A consent judgment is not appealable as a general rule, and where the parties submit a judgment to a Court to which both have consented and the Court approved the agreement, such a consent judgment has *res judicata* effect.¹² Where a party for whom the Court has rendered an adjudication accepts the benefits of that judgment the general rule is that he is estopped from appealing the decision.¹³ In the recent case, *Donovan v. Penn Shipping Co., Inc.*,¹⁴ 429 U.S. 648, 650, the Court reaffirmed the long standing rule that:

"a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted."

The Petitioner's argument that it did not consent should have been raised, if at all, before the District Court by a

¹²United States v. Southern Ute Indians, 402 U.S. 159, 28 L.Ed. 28 (1971); Swift & Co. v. United States, 276 U.S. 311, 72 L.Ed. 587 (1928).

¹³See *Smith v. Morris*, 69 F.2d 3 (3d Cir. 1934).

¹⁴See also *Kantor v. American & Foreign Power Co.*, 197 F.2d 307 (1st Cir. 1952); *Wilson v. Pentasote Co.*, 254 F.2d 700 (2d Cir. 1958); *Kaiser v. Standard Oil Co.*, 89 F.2d 58 (5th Cir. 1937).

motion under Fed. R. Civ. P. 60(b)(1). There would then have been a hearing or an argument on that issue before the District Court. However, the Petitioner never sought to do this although allowed one year by the Rule. Instead, the Petitioner accepted payment of the consent judgment and the satisfaction of the record. (Petitioner's argument that the Clerk's docket entry "characterizing" the judgment as a consent judgment "is not controlling." (p. 11, FN 10) would virtually repeal Fed. R. Civ. P. 58.)

The cases cited by the Petitioner do not involve appeals from consent judgments. For example, *United States v. Houghman*, 364 U.S. 310, 312, considered an appeal from a "judgment" which was arguably inadequate. In those circumstances, the Court held:

"acceptance of payment of the amount of the *unsatisfactory* judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." (Emphasis added)

An "unsatisfactory" judgment is not a "consent" judgment. In any event, as noted above, the United States had one year, and adequate notice, in which to apply for relief.

3. The acceptance of the payment of the consent judgment, is significant because it satisfied and thereby extinguished the consent judgment. It also brought to an end a case which has been litigated since 1973. In the 5 years of litigation Respondent has paid a \$5,000 penalty for *not* supplying containers and a \$102,000 penalty for supplying containers. After two hearings before the District Court and a consent judgment which was paid and satisfied, an appeal, briefs, argument, and decision in the Court of Appeals, we submit this litigation should have ended. Both parties have already had their day in Court.

4. Finally, the contrary to the Petitioner's argument (p. 13), the Court of Appeals dismissal was "explained" at considerable length at the oral argument. Therefore, there really is no "troubling uncertainty" regarding the standards for appellate jurisdiction by the Court of Appeals "summary action." Summary action would be appropriate in exactly this type of case and has been utilized by the Court in similar litigation. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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